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No. 09-1095

Supreme Court, U.S.
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In The Supreme Court of the United States

JOHN AND VERNICE DAILY,

Petitioners,

vs.

STATE OF OKLAHOMA, *ex rel.* OKLAHOMA DEPARTMENT OF HUMAN SERVICES; HOWARD HENDRICK, Director of Oklahoma Department of Human Services; OKLAHOMA HEALTH CARE AUTHORITY; MIKE FOGARTY, Director of Oklahoma Health Care Authority; and HOWARD HENDRICK, Individually,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Third Division

RESPONDENTS' BRIEF IN OPPOSITION

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THE PARTIES

Respondents are the state agencies which operate Oklahoma's Medicaid Program and the chief executives of those agencies.

Petitioner John Daily lives in a nursing home and has applied for Medicaid to pay for his care there. Petitioner Vernice Daily is his wife and lives at home.

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INTRODUCTION

This case involves one aspect of the "spousal impoverishment" provisions of the Medicaid Act that were discussed by this Court in *Wisconsin Department of Health and Family Services v. Blumer*, 534 U.S. 473, 122 S.Ct. 962 (2002).

Petitioner John Daily is an institutionalized spouse. Petitioner Vernice Daily is his wife and a community spouse. When Mr. Daily entered a nursing home, the couple had $121,740 in Medicaid-countable resources.

After Mr. Daily moved to the nursing home, Mrs. Daily created a Community Spouse Annuity Trust (CSAT). The trust could not be revoked or amended and would pay its entire corpus and income to her in 48 monthly payments. Mr. Daily then funded the CSAT with $51,000 – an amount equal to his half of the couple's resources on the date he entered the nursing home, less $9,870 that had been spent. This left Mrs. Daily with $111,670, made up of her half of the couple's original $121,740 plus $51,000 of Mr. Daily's half.

Mr. Daily then applied for Medicaid to pay for his nursing home care. Respondent Oklahoma Department of Human Services (OKDHS) followed the procedure for allocating resources between community and institutionalized spouses, set forth at 42 U.S.C. § 1396r-5(f)(2), and attributed half the $121,740 total to each. Respondent OKDHS then denied Mr. Daily's

Medicaid application because he had resources exceeding the $2,000 Medicaid limit.

Petitioners claim that Mr. Daily's half of the $121,740 has been 'spent down' by using $9,870 for expenses and converting the remaining $51,000 into an 'unavailable resource' – the CSAT. Their claim that the trust is an unavailable resource is based on 42 U.S.C. § 1396p(d)(3)(B)(i), which says that the corpus of an irrevocable trust is an available resource only to the extent that payment could be made from it for the benefit of the trust beneficiary.

Petitioners were unsuccessful in their administrative appeals. Their appeal to the state district court, which was decided on the record of administrative proceedings and briefs, was successful. Respondents then appealed to the Oklahoma Supreme Court, which assigned the case to the Oklahoma Court of Civil Appeals for review pursuant to 20 Oklahoma Statutes § 30.1. For procedural reasons, no new briefs were filed, instead the Court of Civil Appeals reviewed the administrative record and briefs filed by the parties in the state district court.

The Oklahoma Court of Civil Appeals reversed the district court and ruled that the corpus of Mrs. Daily's trust was an available resource. In doing so, the Court followed the reasoning of the Third Circuit in *Johnson v. Guhl*, 357 F.3d 403 (3d Cir. 2004). The Court did not address the other theories that Respondents had advanced.

Before moving to the merits, Respondents must address two items. First, Petitioners cite 42 U.S.C. § 1257 as giving this Court jurisdiction. Since no such statute exists, Respondents believe that Petitioners meant to cite 28 U.S.C. § 1257.

The second item is that Petitioners refer to both the "Court of Civil Appeals" and "Court of Appeals." Since Oklahoma has no Court of Appeals, Petitioners believe that any such reference was meant to be to the Oklahoma Court of Civil Appeals.

MEDICAID

The first question that Petitioners present for review is, "Whether the corpus of a trust payable to Mrs. Vernice Daily was an 'available resource' for Mr. John Daily, her spouse, in a determination of his eligibility for Medicaid benefits?" Petitioners claim, "Review is warranted because the opinion of the Oklahoma Court of Appeals as to the availability of the trust corpus is contrary to federal Medicaid law."

Supreme Court Rule 10(c)

Evaluation of this claim for the grant of *certiorari* fits best within this Court's Rule 10(c), "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . ." Although Petitioners explain why they believe the Oklahoma

Court of Civil Appeals decided this issue incorrectly, they do not explain why the issue is important or why this Court should settle it.

The question Petitioners seek to have reviewed has not been of much interest to the courts. Petitioners have found only one reported case dealing with a couple who set up a CSAT – *Johnson v. Guhl*, 357 F.3d 403 (3d Cir. 2004). The other three cases they cite deal with couples who purchased commercial annuities. As shown below, a commercial annuity and a CSAT are treated differently when determining Medicaid eligibility.

The Merits

Petitioners argue that the Court of Civil Appeals was incorrect in concluding that the corpus of Mrs. Daily's CSAT was an available resource because income of a community spouse may not be attributed to an institutionalized spouse. Their argument is flawed because it is based on cases dealing with commercial annuities rather than CSATs.

Petitioners first cite *Estate of F.K. v. Division of Medical Assistance and Health Services*, 863 A.2d 1065 (N.J. Super. 2005), in which the institutionalized and community spouses bought a commercial annuity which solely benefitted the community spouse. *Id.* at 1067. In deciding that the commercial annuity was not a resource available to the institutionalized spouse, the Superior Court of New Jersey noted that a CSAT was not the same as a commercial

annuity for purposes of Medicaid eligibility. *Id.* at 1073.

Petitioners next cite *James v. Richman*, 465 F.Supp. 2d 395 (M.D. Pa. 2006), another case in which a commercial annuity that made all payments to the community spouse was purchased. *Id.* at 399. Petitioners fail to cite *James v. Richman*, 547 F.3d 214 (3d Cir. 2008) in which the Third Circuit affirmed the district court decision.

Petitioners lastly cite *Ross v. Department of Public Welfare*, 936 A.2d 552 (Pa. Commw. Ct. 2007). Again, a commercial annuity was purchased that made all payments to the community spouse. *Id.* at 553.

This leaves *Johnson v. Guhl*, 357 F.3d 403 (3d Cir. 2004), as the only case mentioned by Petitioners that involves a community spouse who is the beneficiary of a CSAT. Since a CSAT is an irrevocable trust, the court relied entirely on 42 U.S.C. § 1396p(d)(3)(B)(i), which says that when faced with an irrevocable trust:

> if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income –

> (I) to or for the benefit of the individual, shall be considered income of the individual, and
>
> (II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section.

Johnson, 357 F.3d at 408-409.

None of the other cases cited by Petitioners mention 42 U.S.C. § 1396p(d)(3)(B)(i) because none of the courts treat commercial annuities as trusts. That a CSAT and a commercial annuity should be treated differently is illustrated by the Third Circuit's treatment of the two items. In *Johnson*, decided in 2004, the Third Circuit analyzed the CSAT as a resource in terms of it being an irrevocable trust. Four years later in *James v. Richman*, the Third Circuit analyzed the availability of a commercial annuity as a resource and relied on 42 U.S.C. § 1396r-5 in its analysis – not mentioning 42 U.S.C. § 1396p(d)(3)(B)(i) or *Johnson* at all. 547 F.3d 214 (3d Cir. 2008) Since *James* did not mention *Johnson*, let alone overrule it, the court obviously thought that the treatment of commercial annuities and CSATs were completely separate issues.

The decision of the Oklahoma Court of Civil Appeals follows the *Johnson* analysis. Since *Johnson* and this case are the only two CSAT cases Petitioners can find, and the two are completely in accord, there appears to be no reason for this Court to grant *certiorari*.

Alternate Theories

If this Court does not find the reasoning in *Johnson* to be persuasive, then the outcome reached by the Court of Civil Appeals is supported by two alternate theories that were advanced by Respondents in state district court. As previously mentioned, for procedural reasons the parties filed no appellate briefs.

The first theory relates to attribution of the couple's resources in excess of the Community Spouse Resource Allowance (CSRA). As explained in *Wisconsin v. Blumer,* a community spouse is only entitled to keep resources up to the CSRA, which is calculated according to the formula set forth at 42 U.S.C. § 1396r-5(f)(2). Any resources in excess of the CSRA belong to the institutionalized spouse. 534 U.S. at 482-483, 122 S.Ct. at 968-969.

Petitioners owned countable resources totaling $121,740 when Mr. Daily entered the nursing home. Following 42 U.S.C. § 1396r-5(f)(2), Respondents divided $121,740 in half to arrive at her $60,870 CSRA. The rest of the couple's resources were attributed to Mr. Daily as the institutionalized spouse pursuant to 42 U.S.C. § 1396r-5(c)(2)(B). Since Mr. Daily had spent $9,870 by the time he applied for Medicaid, Respondents counted the remaining $51,000 attributed to him according to 42 U.S.C. § 1396r-5(c)(2)(B) against the $2,000 Medicaid resource limit. Mr. Daily's Medicaid application was therefore denied

because he had resources that were $49,000 above the limit.

The second alternate theory is related to the first. 42 U.S.C. § 1396p(c)(1) says that an individual is disqualified from Medicaid for transferring resources without receiving fair market value in return. An exception to disqualification is when:

> An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse.

42 U.S.C. § 1396r-5(f)(1). Mr. Daily made a transfer to his community spouse in excess of the CSRA when he transferred $51,000 to the CSAT – which solely benefitted Mrs. Daily. This transfer subjected him to the 42 U.S.C. § 1396p(c)(1) transfer penalty.

PRECLUSION

The second question that Petitioners present for review is, "Whether issue preclusion applies to final determinations of administrative agencies in subsequent litigation?" Petitioners claim, "Review is warranted because the opinion of the Oklahoma Court of Appeals ignores the application of issue preclusion to administrative decisions."

Petitioners claim is based on an unreviewed administrative decision of Respondent Oklahoma Department of Human Services in which Petitioners were not involved. Petitioners claim that the Oklahoma Court of Civil Appeals failed to follow Oklahoma law on administrative preclusion in rejecting their preclusion argument. The Oklahoma Court of Civil Appeals dealt with this argument summarily, stating, "The agency's decision is not precluded by its hearing officer's contrary decision in another applicant's case." Petitioners' Appendix, p. A-13 ¶ 18.

Petitioners' argument is **not** whether a federal court gave proper preclusive effect to an unreviewed state administrative agency decision according to 28 U.S.C. § 1738. Their argument relates solely to an Oklahoma court's application of Oklahoma law. Petitioners make no claim that any federal right is implicated. Petitioners' claim of error on this issue fits none of the categories in Supreme Court Rule 10. Therefore, no grounds for grant of *certiorari* exist.

CONCLUSION

For the foregoing reasons, the *Petition for Writ of Certiorari* should be denied.

Respectfully submitted,

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